UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

YVONNE TAYLOR, and SOUTH DAKOTA MUNICIPAL LEAGUE, Plaintiffs, v. STEVEN HAUGAARD, in his official capacity as Speaker of the House, Defendant.	)	Case No. **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65(a) and LR 65.1, Plaintiffs move this Court for a preliminary injunction ordering Defendant to immediately allow Yvonne Taylor on the floor of the House of Representatives ("House Floor") during the hours the public and other lobbyists are allowed. An Affidavit of Yvonne Taylor is filed in support of this motion. Plaintiffs move for a preliminary injunction to be issued immediately and the permanent injunction to be heard at a later date.

STATEMENT OF FACTS

The relevant facts are set forth in detail in Plaintiffs' Complaint for Preliminary and Permanent Injunctive Relief and the Affidavit of Yvonne Taylor. All facts summarized below are found in or attached to the Affidavit of Yvonne Taylor. They are summarized below.

Plaintiff Yvonne Taylor ("Taylor") is the Executive Director of the South Dakota Municipal League, and has been since September of 1996. Plaintiff South Dakota Municipal League is a private, non-profit organization of municipalities, with its principal place of business in Stanley County, South Dakota. The South Dakota Municipal League ("the League") represents the state's 309 incorporated municipalities. Organized in 1934, the League's mission

is to facilitate the cooperative improvement of municipal government in South Dakota. The League also advocates for its members. Policies are determined by the vote of members representing cities and towns of every size. In addition, the League offers its members research and training programs, League-sponsored risk-pooling options, investments, computer software, website design and ordinance codification.

Taylor is a registered lobbyist with the South Dakota Secretary of State, and has been continuously registered to lobby on behalf of the South Dakota Municipal League from 1997-2019. Taylor also had three years of lobbying experience in 1992, 1993, and 1994 also on behalf of the South Dakota Municipal League. She also lobbies for one other association which is affiliated with the Municipal League.

The House Floor is open to lobbyists as well as to the general public during certain hours while the Legislature is in session. Since at least 1991, no particular person or persons have been prohibited from entering onto the House Floor during the hours it is open to the public and lobbyists.

The League publishes a monthly magazine to its members called *South Dakota Municipalities*. Each month Taylor writes a column on items of interest to the members. Among other things, this column has been used to advocate on certain issues important to members, such as referred issues and constitutional amendments, and to encourage political involvement.

Taylor authored a column in the *South Dakota Municipalities* magazine encouraging the members to vote in the June primary election and consider voting for legislators willing to study the issues and not prejudge issues through a narrow predetermined standard. Taylor's column appeared in the May 2018 issue of the *South Dakota Municipalities* magazine. The article garnered no attention from Defendant until the 2019 legislative session began.

On Monday, January 14, 2019, Speaker of the House of Representatives Steven Haugaard ("Haugaard") called Taylor into his office. Haugaard asked Taylor to close the door, and a conversation ensued about the May 2018 column Taylor wrote for the *South Dakota Municipalities* magazine. In this meeting, Haugaard told Taylor that she had made the Legislature look like "a bunch of buffoons." Haugaard stated that Taylor was allowed to privately think the thoughts expressed in the column, but that she could not publish them. Haugaard then asked Taylor not to enter the House Floor during the times it is open to the public until further notice.

On January 16, 2019, Taylor had a letter delivered to Haugaard stating she disagreed with the premise of his action. In the letter, Taylor asked Haugaard to supply her by 5:00 p.m. that day with written justification of his authority to ban Taylor from the House Floor. Taylor received no response.

On January 17, 2019 at 9:00 a.m., Taylor approached the Assistant Sergeant at Arms, Rollie Borth, and asked if Taylor could enter onto the House Floor. Rollie Borth ("Borth") told Taylor that "the Speaker" had instructed him not to let Taylor on the floor. Borth is a state employee and takes direction from Haugaard. Borth then handed Taylor a page from a book, which appeared to be a section of Mason's Manual of Legislative Procedure. This is the authority Haugaard presumably relied upon for banning Taylor from the House floor.

Taylor is now unable to adequately represent the South Dakota Municipal League without being able to speak to legislators on the House Floor when it is open to the public. Taylor is also unable to advocate on other issues where she personally has an interest. A critical component of lobbying, whether for a client or on one's own behalf, is being in the location where and when legislators and groups of legislators can be found. Being on the House

Floor allows lobbyists and members of the public to speak with many legislators in one place at one time. Most legislators do not have offices, so the legislators' desks on the House Floor is the place where most legislators can be found.

One important aspect of lobbying is circulating bill sponsor sheets and explaining to legislators the bill they are being asked to sponsor. A legislator may sign the bill sponsor sheet in order to become a sponsor of a bill. This activity occurs almost exclusively on the floors of the House and Senate. The deadline for getting bill draft requests with completed bill sponsor sheets to the Legislative Research Council is Monday, January 28, 2019.

By being barred from the House Floor, Taylor loses an opportunity to obtain sponsor signatures and communicate with legislators about the bills and related issues. As a result, Plaintiffs' opinion and advocacy efforts are significantly limited. South Dakota's legislative session is less than 40 days in length, making ease of access all the more critical for lobbyists, organizations and members of the public, and making this matter urgent for adjudication. The Speaker's action banning Taylor from the House Floor greatly impedes Plaintiffs' ability to contact legislators and advocate their viewpoints at a critical time in the legislative process.

ARGUMENT

I. Preliminary Injunction Standard

To determine whether to issue a preliminary injunction, the district court must consider: (1) the threat of irreparable harm to the movant; (2) the balance between that harm and the injury that granting the injunction will inflict on the other interested parties; (3) the probability the movant will succeed on the merits; and (4) whether the injunction is in the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

A. The threat of irreparable harm to the movant

As indicated above, Plaintiffs have and will continue to suffer irreparable harm. Bills are currently being introduced, debated, and passed, all without Taylor's involvement in the political process. Taylor is unable to find sponsors and garner support for her own bills, as this activity occurs almost exclusively on the floors of the House and Senate. The deadline for submitting bill draft requests with completed sign-up sheets to the Legislative Research Council is Monday, January 28, 2019, making time extremely limited.

Taylor is unable to adequately represent the League without being able to speak to legislators on the House Floor or advocate on other issues in which she has a personal interest. There are 40 days in this session, making access to legislators all the more critical. The Speaker's action banning Taylor from the House Floor has and continues to greatly impede Plaintiffs' ability to contact legislators and advocate their viewpoint and concerns at a critical time in the legislative process. Taylor has met the first *Dataphase* factor.

B. The balance between that harm and the injury that granting the injunction will inflict on the other interested parties

Allowing Taylor to participate politically and exercise her free speech rights, as she has in the past and other lobbyists and members of the public currently do, will cause no harm to Speaker Haugaard or the Legislature. There simply is no harm that will or can be caused by granting a preliminary injunction. A preliminary injunction will simply allow Taylor to participate in the political process as she has for 25 years in the past without incident or disruption. Taylor has met the second *Dataphase* factor.

C. The probability the movant will succeed on the merits

It is highly likely Taylor will succeed on her First Amendment/First Amendment Retaliation claim. Taylor brought her claim under 42 U.S.C. § 1983, which allows a cause of

action against any person who, acting under the color of state law, deprives the plaintiff of "rights, privileges, or immunities secured by the Constitution" or granted by federal statutes. *Danielson v. Huether*¸ 2018 U.S. Dist. LEXIS 2113565 *6; 2018 WL 6681768 (D.S.D. 2018). Speaker Haugaard banned Taylor from the House Floor in his capacity as Speaker of the House, and utilized a state employee Assistant Sergeant at Arms to execute the directive. Banning Taylor from the House Floor has deprived Plaintiffs' of their right to free speech as secured by the First Amendment. Plaintiffs are very likely to succeed under 42 U.S.C. § 1983.

i. **Content-Based Restrictions on Free Speech**

The First Amendment is applicable to the states through the Fourteenth Amendment, and it prohibits the enactment of laws "abridging the freedom of speech". *U.S. Const., Amdt. 1.* "As a general principle, the First Amendment prohibits the government from restricting expression "because of its message, its ideas, its subject matter, or its content." *Deon v. Barasch*, 2018 U.S. Dist. LEXIS 1589785 *6; 2018 WL 4492946 (M.D.Penn. 2019); *citing Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.,* 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015); "A law in which the restriction is speaker-based does not render its content neutral because 'speech restrictions based on the identity of the speaker are all too often simply a means to control content.'" *Shickel v. Dilger,* 2017 U.S. Dist. LEXIS 86555; 2017 WL 2464998 *21 (2017); *citing Reed*, 135 S.Ct. at 2230 (internal quotations and citations omitted).

This case involves both a lobbyist's right on behalf of herself and the organizations she works to participate in the political process, as well as their right to publicize opinions regarding elected leaders. Both roles must be allowed to utilize free speech. "The purpose of a lobbyist is to influence government, which is the very heart of politics." *Shickel* at *22. With regard to elections for government office, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014)(Roberts, C.J.)(plurality opinion).

Where speech is restricted due to its content, strict scrutiny applies. "[A]ny law or regulation that is content based will be subjected to a strict scrutiny analysis, meaning that the law must be the least restrictive means to achieve a compelling governmental interest." *Deon* at *6; *citing Reed v. Town of Gilbert, Ariz.,* 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). "Political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens united v. FEC,* 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

Speaker Haugaard has not and cannot articulate a compelling state interest that is furthered by banning Taylor from the House Floor due to her political expression. Indeed, there is no legitimate interest to further whatsoever, and certainly no "compelling" interest. The only interest at issue was Speaker Haugaard's dislike of Plaintiffs publishing Taylor's opinion regarding elected officials. Such is not a compelling state interest, nor any kind of legitimate state interest.

In like token, banning Taylor from the House Floor is not narrowly tailored to achieve any compelling state interest. Because a lobbyist's purpose is to influence government, "a speaker-based ban which suppresses political speech requires the government to show that the ban is narrowly tailored to achieve the purpose" behind the law. *Shickel* at *21, *citing Citizens United*, 558 U.S. at 340. There simply was and can be no justification for Speaker Haugaard's conduct within the confines of the Constitution.

Plaintiffs also easily meet the elements of a First Amendment retaliation claim. Just as a state may not enact a law at the outset to prohibit future speech based on its content, a government official also may not retaliate against an individual for exercising her right to free speech. *Danielson v. Huether*¸ 2018 U.S. Dist. LEXIS 2113565 *12; 2018 WL 6681768 (D.S.D. 2018)("The First Amendment generally bars government officials from retaliating against an individual for exercising his right to free speech.")

To state a First Amendment retaliation claim, Plaintiffs must show:

1. That Taylor or the League engaged in activity protected by the First Amendment;
2. That Defendant took adverse action against Taylor that would chill a person of ordinary firmness from continuing the activity; and
3. That the adverse action was motivated at least in part by Plaintiffs' protected activity.

Danielson v. Huether¸ 2018 U.S. Dist. LEXIS 2113565 *12; 2018 WL 6681768 (D.S.D. 2018).

ii. Plaintiff engaged in activity protected by the First Amendment.

It is beyond legitimate dispute that in authoring her May 2018 article, Plaintiff Taylor was engaged in protected speech and that by publishing the article, the League was engaged in protected speech. Plaintiff Taylor's article encourages voter registration, explains the importance of voting for state legislators, and advocates for certain types of candidates over

others. The article criticizes some legislators and advocates voter turnout to elect different legislators. Such political speech is the most protected speech under the First Amendment and associated case law. "The criticism of public officials lies at the heart of speech protected by the First Amendment". *Williams v. City of Carl Junction,* 480 F.3d 871, 874 (8th Cir. 2007). Plaintiffs easily meet the first factor, demonstrating they engaged in activity protected by the First Amendment.

iii. Defendant took adverse action against Plaintiffs that would chill a person of ordinary firmness from continuing the activity.

Next, Plaintiffs must demonstrate Defendant took adverse action against Plaintiff Taylor or the League that would chill a person of ordinary firmness from continuing the activity. This factor also cannot be legitimately disputed. In analyzing this factor, "courts should be 'mindful' that the 'effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003)(citation omitted).

It is axiomatic that a person engaged as a lobbyist would be less likely to author an article expressing her political views if she knew that expression would end or curtail her ability to effectively lobby the Legislature. Further, it is also axiomatic that an organization engaged in lobbying for its members would be less likely to publish such an article if an organization knew that it would end or curtail its executive director's ability to lobby the Legislature. Other lobbyists, organizations, and members of the public will also be disinclined to exercise their free speech right if the retaliation suffered infringes upon their ability to further express their opinions or be politically involved. If such unconstitutional conduct goes unchecked, it will chill the Plaintiffs and others from continuing to exercise their right to free expression. As in *Danielson*, this Court can easily find this factor met. See *Danielson* at *14.

iv. The adverse action was motivated at least in part by Plaintiffs' protected activity.

Finally, Plaintiffs must demonstrate a causal connection between the retaliation and the protected activity. This causal connection is easily found in the rationale Defendant gave to Plaintiff Taylor for prohibiting her entry onto the House Floor. On January 14, 2019, Defendant called Plaintiff Taylor into his office and told her that the article she wrote and the League published made the Legislature look like "a bunch of baffoons". Aff. of Yvonne Taylor, ¶ 8. Defendant stated that Plaintiff Taylor was allowed to think those thoughts, but she was not allowed to publish them in the League's magazine. *Id.*, ¶ 8. Defendant then told Plaintiff Taylor she would not be allowed on the House Floor during the times open to the public until further notice. *Id.,* ¶ 8. Defendant put that edict in place by instructing the Assistant Sergeant at Arms to prohibit Plaintiff's entrance onto the House Floor. *Id.*, ¶ 10.

The only authority Defendant provided for his actions was a page depicting Chapter 74, §§ 805-807, which upon information and belief is from Mason's Manual of Legislative Procedure. Ex C to Aff. of Yvonne Taylor. Such "authority" merely indicates a state legislative body may protect itself and maintain order and dignity in its own halls. It goes without saying that any such rules do not and cannot trump Constitutional rights. Moreover, there is no evidence that Plaintiff Taylor committed an "act of contempt", "disorderly conduct", or anything else subjecting her to the potential power of the legislative body to maintain the public order. "A plaintiff may demonstrate a causal connection through circumstantial evidence, such as unusually suggestive timing for the adverse action." *Danielson* at 15. Here, Defendant admitted forthright that Plaintiff Taylor was prohibited from lobbying on the House Floor because of the content of her article in the League magazine. The third factor is easily met.

v. Chilling Effect

Plaintiffs also demonstrate a chilling effect that has or will result from Speaker Haugaard's actions. "The act of lobbying is protected by the First Amendment right to petition the government." *Shickel* at *23; *citing Eaton v. Newport Bd. Of Educ.*, 975 F.2d 292, 297 (6th Cir. 1992). "Lobbying is thus protected from overly broad restrictions that cause a chilling effect on the protected expression." *Shickel* at *23; *citing Broadrick v. Oklahoma,* 413 U.S. 601, 630, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Plaintiff Taylor was singled out due to the content of her speech, and has therefore been treated differently than other lobbyists, organization representatives, and members of the public. Even laws treating all lobbyists "differently from other citizens is subject to the highest level of scrutiny when it seeks to suppress their political expression." *Shickel* at *27; *citing Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)("Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.") Taylor was not treated differently along with an entire class of lobbyists as in *Shickel*. This case is far more egregious, as Taylor individually has been singled out for disparate treatment based upon the content of her magazine article. As Taylor testified, any lobbyist would be less likely to express his or her beliefs publically once they knew that such expression could cause him or her to lose their free speech right to participate politically as a lobbyist or member of the public on the House Floor. *See* Aff. of Yvonne Taylor, ¶ 19. Plaintiffs meet all elements of a First Amendment retaliation claim.

D. Whether the injunction is in the public interest

Finally, the *Dataphase* factors require the Court to consider whether an injunction in Plaintiffs' favor is in the public interest. There is no genuine argument to the contrary.

Lobbyists and members of the general public should not be singled out and stripped of their constitutionally-protected rights for exercising their constitutionally protected rights. Our form of government would quickly collapse if all (or any) persons were banned from lobbying our elected officials because of the content of that expression or the content of previous public expression. It is within the public's interest that Plaintiffs' views are heard along with all others who choose to express their views to legislators. The public ultimately suffers when their retained lobbyists or they themselves are banned from the political process in retaliation for the content of their previous or future speech.

All the *Dataphase* factors are met. The Court should grant a preliminary injunction in Plaintiffs' favor as soon as this matter may be heard.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court:

1. Schedule a preliminary injunction hearing on this motion as soon as possible;

2. Following the hearing, enter a preliminary injunction ordering Defendant to allow Yvonne Taylor on the House Floor during the hours the public and other lobbyists are allowed;

3. Grant Plaintiffs their attorneys' fees and costs; and

4. Grant such other relief as this Court deems appropriate.

Dated: January 22, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, a true and correct copy of Memorandum in Support of Motion for Preliminary Injunction was filed with the Clerk of Court using the CM/ECF system and a copy was served via U.S. Mail, postage prepaid, upon the following:

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